

FCC 97-198

Federal Communications Commission

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Amendment of Part 0 of the Commission's)	
Rules to Implement the Electronic)	GC Docket No. 97-143
Freedom of Information Act Amendments)	
of 1996)	

NOTICE OF PROPOSED RULEMAKING

Adopted: June 5, 1997 Released: June 19, 1997

COMMENT DATE: **July 25, 1997**
REPLY COMMENT DATE: **August 8, 1997**

By the Commission:

I. INTRODUCTION

1. In this Notice, we propose to amend Part 0 of the Commission's Rules to implement the amendments to the Freedom of Information Act ("FOIA") that were enacted in the Electronic Freedom of Information Act Amendments of 1996 ("EFOIA").¹

2. The FOIA, which establishes a right of access to Federal agency records, was enacted 30 years ago, before the extensive use of computers to create and retain records in electronic formats. With the advent and widespread acceptance of new information technologies, questions increasingly arose about how electronic records should be handled under the FOIA. The EFOIA, signed into law on October 2, 1996, "bring[s] FOIA into the information and electronic age"² through amendments that directly address electronic records. The EFOIA also addresses procedural aspects of the FOIA, including the time limits for processing FOIA requests.

¹ Pub. L. No. 104-231, 110 Stat. 3048 (1996), *codified at scattered subsections of* 5 U.S.C. § 552.

² President Clinton's Statement on Signing H.R. 3802, The Electronic Freedom of Information Act Amendments (Oct. 2, 1996).

Federal Communications Commission

3. Several of the Commission's FOIA rules must be revised to conform to the provisions of the EFOIA. We therefore initiate this proceeding to implement the EFOIA amendments.

II. DISCUSSION

4. To implement the EFOIA amendments, we seek comment on the proposed revisions to our FOIA rules set forth in Appendix A. The proposals are intended to conform our rules to express requirements of the EFOIA. In addition, as directed by the EFOIA, we propose new rules to provide for the expedited processing of FOIA requests.

5. ***Form or Format Requests.*** A significant change enacted in the EFOIA is the requirement that agencies honor requests that records be provided in specific formats, including electronic formats, so long as the records are "readily reproducible by the agency in that form or format."³ Prior to this amendment, agencies were under no obligation to accommodate a FOIA requester's preferences as to format.⁴ We propose to amend section 0.461(a) of our rules to reflect this new requirement.

6. ***Time for Processing Initial FOIA Requests.*** The EFOIA provides that, effective October 2, 1997, agencies will have 20 working days (rather than the current 10 working days) to respond to initial FOIA requests.⁵ To implement the statutory amendment, we propose to amend section 0.461(g) of our FOIA rules.⁶

7. The EFOIA further recognizes that in some circumstances, agencies may need more than 20 working days to process FOIA requests. Prior to the EFOIA's enactment, agencies were permitted to extend the time for responding to initial FOIA requests an additional 10 working days,⁷ and these provisions remain in effect. However, if an extension of more than 10 working days is sought, the EFOIA amendments require that an agency provide requesters with the opportunity both to limit the scope of their requests to enable processing within the 10 day statutory time limit for extensions, or to negotiate an alternate

³ EFOIA § 5, codified at 5 U.S.C. § 552(a)(3)(B).

⁴ See H.R. Rep. No. 795, 104th Cong., 2d Sess. 21 (1996) (HOUSE REPORT), citing *Dismukes v. Department of the Interior*, 603 F. Supp. 760, 763 (D.D.C. 1984).

⁵ EFOIA § 8(b), codified at 5 U.S.C. § 552(a)(6)(A)(i). See HOUSE REPORT at 26-27.

⁶ 47 C.F.R. § 0.461(g).

⁷ Former 5 U.S.C. § 552(a)(3)(B); 47 C.F.R. § 0.461(g).

Federal Communications Commission

time frame for processing requests.⁸ We propose to amend section 0.461(g) of our FOIA rules to reflect these changes.⁹

8. ***Expedited Processing.*** The EFOIA requires agencies to promulgate through a notice and comment rulemaking regulations to consider requests for "expedited processing" of initial FOIA requests.¹⁰ Such requests must be granted whenever a "compelling need" is shown and may be granted in other cases as determined by the agency.¹¹ "Compelling need" is defined in the EFOIA as (1) involving "an imminent threat to the life or physical safety of an individual";¹² or (2) in the case of a request made by "a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity."¹³ When a request for expedited processing is made, an agency must notify the requester of its decision whether or not to grant the request for expedition within 10 calendar days.¹⁴ If expedited processing is granted, an agency must process the request as soon as practicable.¹⁵ If the request is denied, an agency must grant expedited consideration of appeals of such a denial.¹⁶

9. To implement the expedited processing requirements of the EFOIA amendments, we propose to amend section 0.461 of our FOIA rules by adding a new paragraph (h). Our

⁸ EFOIA § 7(b), *codified at* 5 U.S.C. § 552(a)(6)(B). If the requester refuses either option, or no agreement can be reached with the agency, a court must take this into account in considering whether to afford an agency additional time to process the request. EFOIA § 7, *codified at* 5 U.S.C. §§ 552(a)(6)(B)(ii) and 552(a)(6)(C).

⁹ 47 C.F.R. § 0.461(g).

¹⁰ EFOIA § 8(a), *codified at* 5 U.S.C. § 552(a)(6)(E).

¹¹ EFOIA § 8(a), *codified at* 5 U.S.C. § 552(a)(2)(E)(i).

¹² 5 U.S.C. § 552(a)(6)(E)(v)(I). The HOUSE REPORT at 26 explains that "A threat to an individual's life or physical safety qualifying for expedited access should be imminent. A reasonable person should be able to appreciate that a delay in obtaining the requested information poses such a threat."

¹³ 5 U.S.C. § 552(a)(6)(E)(v)(II). According to the HOUSE REPORT at 26, to qualify for expedited processing, the dissemination of information must be the "main activity" of the requester. The "urgency to inform" standard requires that the information requested pertain to "a matter of current exigency to the American public" and that delay would compromise a significant recognized interest, but, by itself, the public's right to know is not enough.

¹⁴ 5 U.S.C. § 552(a)(2)(E)(ii)(I).

¹⁵ 5 U.S.C. § 552(a)(6)(E)(iii).

¹⁶ 5 U.S.C. § 552(a)(6)(E)(ii)(II).

Federal Communications Commission

proposal for the most part tracks the language of the statute. The proposed rules place on the requester the burden of demonstrating a compelling need.¹⁷ As required by 5 U.S.C. § 552(a)(6)(E)(ii)(II), the rules also must provide for administrative appeals of a denial of a request for expedited processing. We propose to allow for the filing of an application for review within five working days of the denial of a request for expedited processing. The Commission will act expeditiously on such applications.

10. **Miscellaneous Revisions.** The EFOIA requires that the Commission make available a guide for requesting records or information from the Commission.¹⁸ The Commission's Public Service Division of the Office of Public Affairs has long published annually a guide to finding information at the FCC.¹⁹ We propose to amend section 0.443 of our rules to reflect the availability of this important resource tool for the public. We also propose to amend our rules to reflect the availability of Commission records and information on the Internet.

III. PROCEDURAL MATTERS

11. **Ex Parte.** This is a non-restricted rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

12. **Regulatory Flexibility Act Certification.** Section 603 of the Regulatory Flexibility Act, as amended ("RFA"),²⁰ requires an initial regulatory flexibility analysis in notice and comment rulemaking proceedings unless we certify that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."²¹ The purpose of this Notice is to implement the amendments to the FOIA enacted through the EFOIA. In particular, the proposed rules concern time limits for processing FOIA requests, requests for expedited processing, and requests that records be produced in specific formats. The proposed rules for the most part simply adopt the language of the EFOIA amendments. There is no reason to believe that the revised rules will impose any costs on FOIA requesters beyond those costs incurred under our former rules. Accordingly, we certify, pursuant to

¹⁷ See HOUSE REPORT at 25 (requester bears the burden of showing expedition is appropriate).

¹⁸ EFOIA § 11, codified at 5 U.S.C. § 552(g). See HOUSE REPORT at 29-30.

¹⁹ *Information Seekers Guide: How to Find Information at the FCC*, Public Service Division, Office of Public Affairs, FCC (Jan. 1997).

²⁰ 5 U.S.C. § 603.

²¹ 5 U.S.C. § 605(b).

Federal Communications Commission

section 605(b) of the RFA, that the proposed rules will not have a significant economic impact on a substantial number of small entities. The Secretary shall send a copy of this certification to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this certification will also be published in the Federal Register.

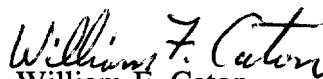
13. **Filing Comments.** Pursuant to the procedures set forth in 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before 30 days after publication of this Notice in the Federal Register, and reply comments may be filed on or before 45 days after publication of this Notice in the Federal Register. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, DC 20554. Parties should also submit one copy of any documents filed in this docket with ITS, 2100 M Street, N.W., Suite 140, Washington, DC 20037. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

12. **Contact Persons.** For further information concerning this proceeding contact Laurence H. Schecker or Linda P. Armstrong, Office of General Counsel, at (202) 418-1720.

III. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that pursuant to sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 154(j), and the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996), a NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

Federal Communications Commission

APPENDIX A -- PROPOSED RULES
(AMENDED LANGUAGE HIGHLIGHTED)

Part 0 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 0 -- COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.441 is proposed to be revised as follows:

§ 0.441 General.

Any person desiring to obtain information may do so by writing or coming in person to any of the Commission's offices. A broader range of information and more comprehensive information facilities are available at the Commission's main office in Washington, D.C., however, and inquiries of a general nature should ordinarily be submitted to that office. A **wide range of information is also available from the Commission's World Wide Web site located at <<http://www.fcc.gov>>.**

3. Section 0.443 is proposed to be revised as follows:

§ 0.443 General information office.

The **Public Service Division of the Office of Public Affairs** is located at 1919 M Street, N.W., Washington, D.C. Here, the public may obtain copies of the **"Federal Communications Commission Information Seekers Guide,"** which is a handbook for obtaining information from the FCC. This office also maintains current and back issues of public notices of Commission actions, formal documents adopted by the Commission, and copies of fact sheets that answer general questions about the Commission. Many such recent items may also be obtained from the Commission's World Wide Web site located at <<http://www.fcc.gov>>. Commission documents listed in Section 0.416 are published in the FCC Record, and many such documents or summaries thereof are also published in the Federal Register.

4. Section 0.453 is proposed to be revised as follows:

§ 0.453 Public reference rooms.

Federal Communications Commission

The Commission maintains the following public reference rooms at its offices in Washington, DC, Gettysburg, Pennsylvania, and Columbia, Maryland. Much of the information available from the public reference rooms may also be retrieved from the Commission's World Wide Web site at <<http://www.fcc.gov>>.

* * *

5. Section 0.455 is proposed to be revised as follows:

§ 0.455 Other locations at which records may be inspected.

Except as provided in §§ 0.453, 0.457 and 0.459, records are routinely available for inspection in the offices of the Bureau or Office which exercises responsibility over the matters to which those records pertain (see § 0.5), or will be made available for inspection at those offices upon request. Many of these records may be retrieved from the Commission's site on the World Wide Web, located at <<http://www.fcc.gov>>. Upon inquiry to the appropriate Bureau or Office, persons desiring to inspect such records will be directed to the specific location at which the particular records may be inspected. A list of Bureaus and Offices and examples of the records available at each is set out below.

* * *

6. Section 0.460 is proposed to be amended as follows:

§ 0.460 Requests for inspection of records which are routinely available for public inspection.

(a) Sections 0.453 and 0.455 list those Commission records which are routinely available for public inspection and the places at which those records may be inspected. Subject to the limitations set out in this section and to the provisions of § 0.466 and paragraph (l) of this section, a person who wants to inspect such records need only appear at the specified location and ask to see the records. Many such records also are available through the Commission's site on the World Wide Web, located at <<http://www.fcc.gov>>. Commission documents listed in Section 0.416 are published in the FCC Record, and many such documents or summaries thereof are also published in the Federal Register.

* * *

7. Section 0.461 is proposed to be amended as follows:

§ 0.461 Requests for inspection of materials not routinely available for public inspection.

Federal Communications Commission

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(a) (1) The records in question must be reasonably described by the person requesting them, so as to permit their location by staff personnel. See § 0.460(c).

(2) The person requesting records under this section may specify the form or format of the records to be produced.

* * *

(g)(1) The custodian of the records will make every effort to act on the request within **20** working days after it is received by the FOIA Control Office. If it is not possible to locate the records and to determine whether they should be made available for inspection within **20** working days, the custodian may, in any of the following circumstances, extend the time for action by up to 10 working days:

(A) It is necessary to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

(B) It is necessary to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(C) It is necessary to consult with another agency having a substantial interest in the determination of the request, or among two or more components of the Commission **having substantial subject matter interest therein.**

(2) The custodian of the records will notify the requester in writing of any extension of time exercised pursuant to paragraph (g)(1). If it is not possible to locate the records and make the determination within the extended period, the person or persons who made the request will be provided an opportunity to limit the scope of the request so that it may be processed within the extended time limit, or an opportunity to arrange an alternative time frame for processing the request or a modified request, and asked to consent to an extension or further extension. If the requester agrees to an extension, the custodian of the records will confirm the agreement in a letter specifying the length of the agreed-upon extension. If he or she does not agree to an extension, the request will be denied, on the grounds that the custodian has not been able to locate the records and/or to make the determination within the period for a ruling mandated by the Freedom of Information Act, 5 U.S.C. 552. In that event, the custodian will continue to search for and/or assess the records and will advise the person who made the request of further developments; but that person may file an application for review by the Commission. When action is taken by the custodian of the records, written notice of the action will be given.

Federal Communications Commission

(h)(1) Requesters who seek expedited processing of FOIA requests shall submit such requests, along with their FOIA requests, to the Managing Director in an envelope marked "Request for Expedited Proceeding -- FOIA Request." An original and two copies of the request for expedition shall be submitted. When the request is received by the Managing Director, it, and the accompanying FOIA request, will be assigned to the FOIA Control Office, where it will be date-stamped and assigned to the custodian of records.

(2) Expedited processing shall be granted to a requester demonstrating a compelling need that is certified by the requester to be true and correct to the best of his or her knowledge and belief.

(3) For purposes of this subsection, "compelling need" means --

(A) that failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(B) with respect to a request made by a person primarily engaged in disseminating information, there is an urgency to inform the public concerning actual or alleged Federal Government activity.

(4)(A) Notice of the determination as to whether to grant expedited processing shall be provided to the requester by the custodian of records within 10 calendar days after receipt of the request by the FOIA Control Office. Once the determination has been made to grant expedited processing, the custodian shall process the FOIA request as soon as practicable.

(B) If a request for expedited processing is denied, the person seeking expedited processing may file an application for review within five working days after the date of the written denial. The application for review and the envelope containing it (if any) shall be captioned "Review of FOIA Expedited Proceeding Request." The application for review shall be delivered or mailed to the General Counsel. (For general procedures relating to applications for review, see § 1.115 of this chapter.) The Commission shall act expeditiously on the application for review, and shall notify the custodian of records of the disposition of such an application for review.

(i)(1) If a request for inspection of records submitted to the Commission in confidence under § 0.457(d) or § 0.459 is granted, an application for review of the action may be filed only by the person who submitted the records to the Commission. The application for review and the envelope containing it (if any) shall be captioned "Review of Freedom of Information Action." The application for review shall be filed within 10 working days after the date of

Federal Communications Commission

the written ruling, shall be delivered or mailed to the General Counsel, and shall be served on the person who filed the request for inspection of records. The first day to be counted in computing the time period for filing the application for review is the day after the date of the written ruling. If an application for review is not filed within this period, the records will be produced for inspection. The person who filed the request for inspection of records may respond to the application for review within 10 working days after it is filed.

* * *

(j) Except as provided in paragraph (i) of this section, an application for review of an initial action on a request for inspection may be filed only by the person who made the request. The application shall be filed within 30 days after the date of the written ruling by the custodian of records, and shall be captioned, "Review of Freedom of Information Action." The envelope (if any) shall also be so captioned. The application shall be delivered or mailed to the General Counsel and shall be served on the person (if any) who originally submitted the materials to the Commission. That person may file a response within 10 working days after the application for review is filed. If the records are made available on review, the person who submitted them to the Commission (if any) will be afforded 10 working days after the date of the written ruling to seek a judicial stay. *See* paragraph (i) of this section. The first day to be counted in computing the time period for filing the application for review or seeking a judicial stay is the day after the date of the written ruling. (For general procedures relating to applications for review, see §1.115 of this chapter.)

(k) [Reserved]

(l) The Commission will make every effort to act on an application for review of an action on a request for inspection of records within 20 working days after it is filed. *See*, however, paragraph (i)(2) of this section. If it is not possible to locate the records and to determine whether they should be made available for inspection within 20 working days, the General Counsel may, in the following circumstances and to the extent time has not been extended under paragraphs (g) (1)(A), (B), or (C) of this section, extend the time for action up to 10 working days. (The total period of extensions taken under this paragraph and under paragraph (g) of this section without the consent of the person who submitted the request shall not exceed 10 working days.):

* * *

(3) It is necessary to consult with another agency having a substantial interest in the determination of the request or among two or more components of the Commission **having substantial subject matter interest therein.**

Federal Communications Commission

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(m) Subject to the application for review and judicial stay provisions of paragraphs (i) and (j) of this section, if the request is granted, the records will be produced for inspection at the earliest possible time.

(n) Staff orders and letters denying requests for inspection are signed by the official (or officials) who give final approval of their contents. If a request is denied by the Commission, notice of denial will set forth the names of the Commissioners participating in the decision.

(o) Records shall be inspected within 7 days after notice is given that they have been located and are available for inspection. After that period, they will be returned to storage, and additional charges may be imposed for again producing them.